FILED
NOV 16 1951
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 370.

THE UNITED STATES, *Petitioner*,

v.

BRANCH BANKING AND TRUST COMPANY, ET AL., *Respondents*.

On Petition for a Writ of Certiorari to the Court of Claims.

BRIEF FOR RESPONDENTS IN OPPOSITION.

WARD E. LATTIN,
Washington, D. C.,
Attorney for Respondents.

Of Counsel:
GARDNER, MORRISON & ROGERS,
Washington, D. C.

FRANK A. MCCLENEGHAN,
Charlotte, North Carolina.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

INDEX.

	Page
Question Presented	1
Statute Involved	3
Statement	3
Argument	7
Conclusion	15

CITATIONS.

CASES:

Blume v. *United States*, 81 Ct. Cls. 210	14
Chicago & N. W. Railway Co. v. *Curl*, 178 F. (2d) 497	8
Furay v. *United States*, 34 Ct. Cls. 171	11
Globe Indemnity Co. v. *United States*, 84 Ct. Cls. 587	14
Irwin & Leighton v. *United States*, 106 Ct. Cls. 398	13
Maxwell Land-Grant Co. v. *Dawson*, 151 U. S. 586	8
New York Market Gardeners Association v. *United States*, 43 Ct. Cls. 114	14
Rosaly v. *Gonzalez*, 106 F. (2d) 169	8
United States v. *Grannis*, 172 F. (2d) 507	5
United States, ex rel. Marcus v. *Hess*, 317 U. S. 537	11, 12
United States v. *Wurtsbaugh*, 140 F. (2d) 534	8

STATUTES:

28 U. S. C. 2501	12
28 U. S. C. 2514	3, 7, 8, 9, 10, 11, 12, 13
R. S. 3490, 31 U. S. C. 231	5, 10, 11, 12, 13
Act of June 25, 1948, Pub. Law 773, 80th Cong.	9

MISCELLANEOUS:

Congressional Globe, 37th Cong., 2d Sess., p. 879	9
Congressional Globe, 37th Cong., 2d Sess., App. p. 124	10
H. R. 226, 37th Cong.	9
H. Rep. 34, 37th Cong., 2d Sess	9
4 C. J. S. 396	8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 370.

THE UNITED STATES, *Petitioner*,

v.

BRANCH BANKING AND TRUST COMPANY, ET AL., *Respondents*.

On Petition for a Writ of Certiorari to the Court of Claims.

BRIEF FOR RESPONDENTS IN OPPOSITION.

QUESTION PRESENTED.

The "Question Presented", as set forth at page 2 of the petition for certiorari in this case, is a question quite different from any decided by the Court below; and was not before said court in either the pleadings or evidence upon which the case was tried.

So far as any issue of fraud is concerned (which is the only issue this Court is now asked to review), the question before the Court of Claims was this:

Where a joint venture, consisting of four parties has a cost-plus-a-fixed-fee contract with the United States, and one member of that joint venture commits fraudulent acts in connection with a subcontract under the main contract, with the result that the United States makes payment to the contracting joint venture on reimbursement vouchers of amounts in excess of what it would have paid except for such fraud, may the United States, after having sued and recovered in a Federal Court double the amount of damages sustained as a result of the fraud, plus an additional $20,000, nevertheless, in subsequent suits in the Court of Claims involving non-fraudulent transactions and vouchers under the contract, including as a small part of the total claims two admittedly non-fraudulent vouchers covering the unpaid remainder of the fixed fee, cause said balance of the fixed fee to be forfeited to the United States?

Not only was the question as stated in the petition not decided by the Court below but that Court was in practical effect asked by the petitioner not to decide it. When the case was under consideration by a Commissioner of the Court of Claims, the United States, on May 18, 1949, filed a counterclaim and special plea in fraud and a plea of setoff in which, among other things, it was urged that the entire amount of the claims then being prosecuted before that Court, totaling $292,170.85, be forfeited to the United States. Those pleadings would have caused to be placed before the Court below for decision the very question now posed in the petition for certiorari. However, upon demurrers being filed to said pleadings, together with accompanying brief, the United States filed motions with the Court below asking leave to withdraw them and to file in lieu thereof an entirely different special plea in fraud, which motions were granted.

The new special plea in fraud did not, as the "Question Presented" in the Government's petition for certiorari would suggest, ask forfeiture of the "unpaid balance otherwise due on the non-fraudulently performed items of the contract"; on the contrary, of the unpaid balance of

$292,170.85 it only asked forfeiture of $61,111.50, covering the remainder of the fixed fee otherwise due, (R. 17-19) leaving the general traverse as the only defense made to the remainder of the amount involved.

This Court is now being asked to grant certiorari in this case so it can determine whether the Court below committed error in failing to decide in the Government's favor an issue which, by virtue of the Government's voluntary act in causing to be withdrawn the pleadings which raised it, was not before the Court below, and, therefore, was not decided by it.

STATUTE INVOLVED.

The statute involved is 28 U. S. C. 2514 which provides as follows:

> "A claim against the United States shall be forfeited to the United States by any person who corruptly practices or attempts to practice any fraud against the United States in the proof, statement, establishment, or allowance thereof.
>
> "In such cases the Court of Claims shall specifically find such fraud or attempt and render judgment of forfeiture."

STATEMENT.

The statement of the case as contained in the petition for certiorari does not set forth all facts deemed essential to a clear understanding of the case; furthermore, some of the statements made in the petition are believed to require correction in the interest of complete accuracy. The general order of the "Statement" as contained in the petition will be followed here in order that the additions and corrections can be more readily observed.

On July 31, 1946, respondents (plaintiffs below) filed two suits in the Court of Claims to recover $292,170.85 representing the balance alleged to be due on two Government contracts—one contract being a cost-plus-a-fixed-fee contract entered into in December 1940 for the construction of

Camp Davis near Wilmington, North Carolina (referred to herein as the Camp Davis contract), and the other a lump sum contract entered into in May 1942 for construction of an air corps technical school near Goldsboro, North Carolina (referred to herein as the Goldsboro contract) (R. 2, 10). In opposition to these claims the Government at the outset filed general traverses—not a special plea in fraud or counterclaim (R. 16). After approximately 130 pages of testimony had been taken proof was closed February 7, 1949.

Thereafter on May 18, 1949, the Government, with leave of the Court below filed a counterclaim and special plea in fraud in connection with the claim under the Camp Davis contract and a plea of setoff in connection with the claim under the Goldsboro contract (R. 16). These pleadings, filed nearly three years after the two suits had been commenced, constituted the first suggestion that any issue of fraud was involved in either case. In said pleadings it was claimed that the entire amount of the claims before the court below should be forfeited, and, in addition, that a substantial judgment should be awarded the Government. Demurrers to the counterclaim and special plea in fraud, and to the plea in setoff, were filed on behalf of the plaintiff below, with accompanying brief, and on July 26, 1949, the Government filed a motion with the Court below for leave to withdraw said pleadings relating to fraud, and to file in lieu thereof a new and entirely different special plea in fraud predicated on a different theory of the case. In its motion for leave to withdraw its counterclaim and special plea in fraud, defendant stated that "It will serve no purpose to leave the pleadings in their present state and defendant, therefore, asks leave to correct the legal error it has inadvertently made and to file a special plea in fraud herein" (for $61,111.50). In its motion asking leave to withdraw its plea of setoff defendant below stated that "Plaintiffs have filed a demurrer to defendant's plea of setoff, which demurrer defendant believes is well taken."

The Government's motions to withdraw said pleadings and to file a new special plea in fraud were granted, and on August 12, 1949, its new special plea in fraud was filed in which it claimed that "the balance of the fixed fee in the sum of $61,111.50 should be forfeited to the United States" (R. 17-19). No forfeiture was asked of any other part of the claims before the Court below. No counterclaim other than the one withdrawn, and no plea of setoff other than the one withdrawn, were ever filed or requested to be filed in the Court below, and no counterclaim or plea of setoff was ever considered or passed upon by the Court below.

The plaintiffs below demurred to the second plea of fraud in which forfeiture of $61,111.50 was asked, (R. 19) and it was that demurrer and only that demurrer that was passed on by the Court of Claims and sustained, and which gave rise to any right the Government may have had to ask review by this Court on the issue of forfeiture for fraud.

The facts respecting the issue of fraud, so far as here deemed to be pertinent, are as follows:

In the performance of the Camp Davis contract the use of automobiles and trucks was necessary. By the terms of the contract the contracting joint venture could either cause cars and trucks owned by its members to be rented, or it could rent such equipment from third parties. However, the rentals allowed for third-party equipment exceeded rentals allowed for contractor-owned equipment.

In a suit filed in the United States District Court for the Eastern District of North Carolina to recover forfeitures and damages under Revised Statute Sec. 3490, 31 U. S. C. 231, it was determined by the Fourth Circuit Court of Appeals on February 3, 1949 (*United States* v. *Grannis,* 172 F. (2d) 507), that one of the members of the contracting joint venture, E. W. Grannis, had caused cars and trucks which he in fact owned to be rented to the joint venture in the name of his brother-in-law as third-party-owned equipment. The rent for such equipment was paid for by the joint venture at third-party-rental rates (which,

as above noted, were higher than the rates that Grannis as a member of the contracting group was entitled to receive for his equipment), and the joint venture was reimbursed by the Government for the amounts so paid.

The only member of the contracting joint venture who was a party to the fraud suit in the Fourth Circuit Court of Appeals was Grannis; it is specificially stated by said Court that the other three members were "not party to this suit." It was not alleged in that litigation, nor has it been asserted at any point in the present litigation, that Grannis was acting for or on behalf of the joint venture in the truck rental episode, that he approved any of the payment vouchers on behalf of the joint venture, or that any of the other joint venturers knew of, benefited by, or had anything whatever to do with the wrongdoing. It *is* established that Clarence Parke Street, another member of the joint venture, and *not* E. W. Grannis, served as project manager for the contractor in its dealings with the Government under the Camp Davis contract (R. 29).

The excessive payments made by the Government, as a result of the truck and car rentals involving Grannis, was determined to be $32,355.03 and the United States was awarded a judgment of double damages ($64,710.06) plus $2,000 for each of ten vouchers found to have been involved ($20,000) or a total of $84,710.06—all of which has been paid.

In spite of the fact that the Government had its day in Court in connection with the determined fraud of Grannis and was made completely whole, the Government sought by its special plea in fraud as finally filed and considered in the Court below, to cause an additional amount of $61,111.50 due on non-fraudulent vouchers, representing the unpaid portion of the fixed fee, to be forfeited to the United States. It is plain from the opinion of the Court of Claims sustaining the demurrer of plaintiffs below that the only "part of the petition before the Court", and with which it was dealing in passing on the demurrer, was that part which

involved "two vouchers covering payment of the balance of the fixed fee in the sum of $61,111.50" (R. 22, 23).

After the demurrer was sustained the Commissioner made his findings of fact, briefs were filed, and the cases were heard and decided by the Court below on the merits.

ARGUMENT.

In light of the facts here involved—including the facts (1) that the admitted fraud* only involved one of the four members of the joint venture, (2) that the fraud related to a phase of the contract work not involved in the suits before the Court of Claims, (3) that double the amount of damages sustained by the Government has been recovered, plus $2,000 on each voucher found to have been tainted with fraud, and (4) that no fraud in connection with any of the vouchers involved in the suits before the Court of Claims has even been alleged by the Government—it is submitted that the conclusion of the lower Court that Section 2514 of Title 28, U. S. Code, provides no authortity for forfeiture of the unpaid balance of the fixed fee, is patently correct and review by this Court is not necessary.

1. In asking that a writ of certiorari be granted, the Government devotes its entire argument (with the exception of one paragraph on page 16 of the petition) to the contention that the word "claim" as used in Section 2514 of Title 28, U. S. Code, is synonymous with "contract", and that where fraud is involved in any phase of the performance of a Government contract "all rights under the contract" are forfeited and no recovery of any kind in any suit in the Court of Claims under that contract can thereafter be had.

As previously pointed out, this is an entirely different position and interpretation of the statute from that advanced by the Government in the Court below, and poses a question the Court below did not decide and was in effect

---

* The fraud in question was of course admitted solely for the purpose of testing the Government's plea in fraud on demurrer.

asked by the Government not to decide. Thus, the theory as to the meaning and effect of Section 2514 now taken in the petition for certiorari was advanced in a counterclaim and special plea in fraud, and in a special plea of setoff, filed by the Government in the Court below, but upon "careful study" that position was abandoned and, with the lower Court's permission, the pleadings in which such position was embraced were voluntarily withdrawn by the Government. The Government now asserts, as its principal reason for asking that a petition for certiorari be granted in this case, the failure of the Court below to decide in its favor the question which it posed for the lower Court's consideration and then withdrew as having been improvidently filed—with the result, of course, that the lower Court did not consider or decide it.

A party who acquiesces in or recognizes the validity of an order entered by a lower Court, or takes a position inconsistent with the right to appeal therefrom, has no right to have such order, or the question that would have been presented except for its issuance, reviewed by a higher Court. See 4 C. J. S. 396 and cases there cited. In the present case the Government not only acquiesced in and recognized the validity of the order of the Court below withdrawing from consideration the very question it now asks to have reviewed by this Court, but it sponsored the order and specifically asked the Court to issue it. See also by analogy *Maxwell Land-Grant Co.* v. *Dawson,* 151 U. S. 586; *Rosaly* v. *Gonzalez,* 106 F. (2d) 169; *United States* v. *Wurtsbaugh,* 140 F. (2d) 534; and *Chicago & N.W. Railway Co.* v. *Curl,* 178 F. (2d) 497.

2. Bearing in mind that no fraud occurred, and none is even alleged to have occurred, in connection with any of the items that constitute the subject matter of the present suits, it seems clear not only from the terms of Section 2514 of Title 28, U. S. Code, but also from the legislative history thereof, that no authority is there provided for declaring forfeited the claims involved in these suits, or any of them.

Section 2514 had its genesis as Section 12 of a bill introduced in the House of Representatives on January 17, 1862, as H. R. 226 of the 37th Congress Second Session, by Albert G. Porter, a Representative from Indiana, which bill, with Section 12 unchanged, was destined to be enacted into law on March 3, 1863.*

On February 19, 1862, the bill (H. R. 226) was reported to the House with majority and minority Committee reports, which reports were ordered to be printed. Congressional Globe, 37 Congress, 2nd Sess., p. 879. The House report (H. Rep. 34, 37th Congress, 2nd Sess., dated Feb-

---

* Section 12 of the bill reads as follows: "That any person or persons who shall corruptly practice or attempt to practice any fraud against the United States in the proof, statement, establishment, or allowance of any claim, or any part of any claim, against the United States, shall *ipso facto* forfeit the same to the Government, and it shall be the duty of the Court of Claims, in such cases, to find specifically that such fraud was practiced or attempted to be practiced, and thereupon give judgment that such claim is forfeited to the Government and the claimant be forever barred from prosecuting the same."

Prior to the recent revision and recodification of Title 28 of the U. S. Code, by Act of June 25, 1948 (Pub. Law 773, 80th Cong., 2d Sess.) this provision was contained in the law as Section 279 of Title 28, U. S. Code, R. S. 1086, as follows:

> "Any person who corruptly practices or attempts to practice any fraud against the United States in the proof, statement, establishment, or allowance of any claim, or of any part of any claim against the United States shall, *ipso facto*, forfeit the same to the Government; and it shall be the duty of the Court of Claims, in such cases, to find specifically that such fraud was practiced or attempted to be practiced, and thereupon to give judgment that such claim is forfeited to the Government, and that the claimant be forever barred from prosecuting the same."

It is clear from the history of the revised enactment (Section 2514), and from the Reviser's Notes, that no substantive change in the prior law was intended and that the changes, so far as here pertinent, were merely changes in phraseology.

ruary 19, 1862) contains the following statements with respect to the provision:

> "To provide further against attempts to practice frauds upon the Government in the proof, statement, establishment, or allowance of any claim, the bill contains a provision that a corrupt attempt to practice such fraud shall work a forfeiture of the *particular* claim." (Emphasis supplied.)

On April 15, 1862, the bill came before the House for debate. Mr. Porter, its author, addressed the House on that date "in explanation of the purposes of the bill", and with respect to the section thereof which was destined to become Section 2514 of Title 28, U. S. Code, he stated:

> "To provide further against attempts to practice frauds upon the Government in the proof, statement, establishment or allowance of any claim, the bill contains a provision that a corrupt attempt to practice such frauds shall work a forfeiture of the *particular* claim. This is meant to visit with merited punishment the corrupted moral sense which regards the Government as always a proper prey for fraudulent rapacity." (Emphasis supplied.) (Congressional Globe, 37th Congress, 2nd Sess., Appendix, p. 124.)

There is nothing in the language placed in the law, in the committee reports, or in the debates in either the House or Senate, which in any way suggests that this forfeiture provision was intended to relate to any phase of a contract or to any payment thereunder not before the Court below. In the present case the Government has never contended that fraud was committed in connection with any of the vouchers before the Court, and which cover the items it was seeking to prove, state, establish or have allowed there.

3. Petitioner discusses the history of Section 2514 along with that of 31 U. S. C. 231 (R. S. 3490), both of which

statutes were first enacted into law at about the same time, and concludes that the two acts were intended to form "a comprehensive statutory scheme" to protect the Government against frauds. Such being the case it would seem that since the two statutes are directed at the accomplishment of part of the same overall purpose, namely, to protect the Government against false or fraudulent claims, and are therefore in *pari materia,* the word "claim" as used in both statutes should be similarly construed.

In the suit brought by the Government under 31 U. S. C. 231 in connection with ten fraudulent vouchers under the contract with which we are here concerned, and which gave rise to the specific fraud issue involved in the present cases, it was decided by the Fourth Circuit Court of Appeals that the provision in that statute for forfeiture of $2,000 for the act of filing a false claim, as applied to the facts of this case, meant that $2,000 should be forfeited in the case of each of the ten false vouchers filed.* If each voucher constituted a separate claim for purposes of Section 231 U. S. C. 31, then it would seem to follow that each voucher filed in the suit in the Court of Claims would constitute a separate claim within the meaning of the term "claim" as used in Section 2514.

This does not mean that the term "claim" as used in either 31 U. S. C. 231 or Section 2514 is in all instances synonymous with the term "voucher." In some cases vouchers are not involved in suits where these statutes are invoked. In the case of *United States ex rel. Marcus* v. *Hess,* 317 U. S. 537, 552, where defendants conspired to rig bidding on 51 P. W. A. projects, it was held that each project constituted a separate offense under 31 U. S. C. 231. In *Furay* v. *United States,* 34 Ct. Cls. 171 (relied upon by petitioner, which involved Section 2514, it was held that a U. S. Marshal's account covering expenditures for which

---

* In the Government's brief in the Fourth Circuit it was argued that "Each of the ten vouchers presented to the Government for payment was a false claim."

reimbursement was asked constituted a claim under that section.*

In the *Hess* case the reason given for concluding that each P. W. A. project constituted a separate offense was that the incidents of fraud on each project were "clearly individualized". In the present case each of the several vouchers which go to make up the total amount claimed in the Court below, represents a specific sum which plaintiffs claimed as being due, and it was upon those vouchers that payment was asked. Therefore it would appear that each of those vouchers is "clearly individualized" and constitutes a separate claim.

At pages 14 and 15 of the petition it is argued that the word "claim", as used in Section 2501 of Title 28, has been interpreted to be synonymous with "contract", and that it should be given a similar construction under Section 2514. Suffice it to say that in the cases cited in support of this position and involving Section 2501 it was merely held that a claim did not "accrue" until within six years of the completion and acceptance of contract work. It was the meaning of the word "accrue" not the word "claim" that was being construed by the Court. The cases cited are, therefore, not in point.

4. Even though the Government's position be accepted as correct that 31 U. S. C. 231 and 28 U. S. C. 2514 comprise a comprehensive statutory scheme to protect the Government against frauds, it does not follow that each provision is intended to play the same part in the protective scheme. On the contrary, these provisions were intended to play integrated rather than duplicate or overlapping roles. Thus, if the Government discovers the fraud before it pays the claim it may refuse to pay it, and any action by the claimant in this Court to recover the amount thereof will

---

* Incidentally, not all suits in the Court of Claims arise under contracts. 28 U.S.C. 1491 *et seq.* Accordingly, if the word "claim" as used in Section 2514 is to be construed as synonymous with "contract", as the Government contends, then the provision would only provide protection in contract cases. Obviously this was not the intention of the statute.

fail (assuming the fraud is alleged and proven by the Government) and the entire amount of such claim will be declared by this Court to be forfeited to the United States. On the other hand, if the fraud is not discovered until after the claim is paid, then the United States may file suit against the defrauding party to recover double the amount of damages sustained as a result of the fraud, plus $2,000 for each fraudulent act or offense.

Applying this statutory scheme of Government protection to the situation mentioned at the top of page 14 of the Government's petition "the unscrupulous contractor who succeeds in obtaining payment prior to discovery of his fraud" will be subject to suit by the United States under 31 U. S. C. 231 and if found guilty may be required to refund to the United States double the amount of damages he has caused the Government, plus $2,000 for each act of violation. "The equally unscrupulous but less adroit contractor whose fraudulent vouchers form part of his claim before the Court" will find his right to recover on those vouchers forfeited by the provisions of Section 2514. *Irwin & Leighton* v. *United States*, 106 Ct. Cls. 398, 458, 460-62. Thus whether the fraud is discovered before or after payment, the Government has its remedy; the two statutes work together and protect the Government under any exigency. If the wrongdoing is discovered before payment, its protection stems from 31 U. S. C. 231; if discovered after payment, its protection comes from Section 2514. But the Government may not, as it is seeking to do here, have the benefit of both these remedies under one set of facts.

5. Petitioner apparently seeks to convey the impression that the cases cited by it at page 11 of the petition support the conclusion that under Section 2514 a forfeiture in the Court of Claims may be exacted where fraud is found in any phase of contract performance, even though the particular claim or claims before the Court are based entirely on non-fraudulent vouchers. Such is definitely not the case. In every case cited and relied upon by petitioner the fraud

charged related to and involved the precise subject matter of the items brought before the Court with request for allowance.

The Court of Claims has on occasion, by way of dicta, used some broad general language to the effect that where fraud in the proof, statement, establishment or allowance of a claim against the Government is established, the entire contract will be forfeited, but in each of those cases the alleged fraud *went to the entire contract,* including everything that was before the Court.* The lower Court in its decision in the present case recognized this and stated that by the use of such dicta the Court merely meant that where fraud in the performance of a contract "*enters into every part of that contract,* a claim based on the fraudulent performance would be a fraudulent claim and thus within the forfeiture provision of the statute." (R. 25) (Emphasis added.)

No case has been cited and none has been found where admittedly non-fraudulent claims before the Court have been forfeited because of fraud in connection with other and entirely distinct claims arising under the same contract but not before the Court.

6. In a footnote at page 17 of the petition, it is stated that aside from the fraud issue the Government "reserves the right to raise" a further question relating to the correctness of the lower Court's decision on the merits, in allowing recovery by plaintiff below of the amount claimed. The facts relating to the merits are not set forth and the questions there involved are not stated or mentioned in the petition. In Rule 41 of the rules of this Court, it is provided that "only the questions *specifically brought forward* by the petition for writ of certiorari will be considered." (Emphasis added.) The reservation of a right to raise a question does not amount to specifically bringing it forward in the petition.

---

* Three of the cases cited at page 11 of the petition are in this category. *New York Market Gardeners Association* v. *United States,* 43 Ct. Cls. 114, 136; *Blume* v. *United States,* 81 Ct. Cls. 210, 216, *Globe Indemnity Co.* v. *United States,* 84 Ct. Cls. 587, 593.

CONCLUSION.

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari in this case should be denied.

WARD E. LATTIN,
Washington, D. C.,
Attorney for Respondents.

Of Counsel:
GARDNER, MORRISON & ROGERS,
Washington, D. C.
FRANK A. MCCLENEGHAN,
Charlotte, North Carolina.